UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOK, TELLITOCCI, and HAIGHT
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist TRISTAN K. WHITFIELD
United States Army, Appellant

ARMY 20130212

Headquarters, III Corps and Fort Hood
Gregory A. Gross, Military Judge (arraignment)
Patricia H. Lewis, Military Judge (trial)
Colonel Stuart W. Risch, Staff Judge Advocate

For Appellant: Major Amy E. Nieman, JA; Captain Brian J. Sullivan, JA (on brief).

For Appellee: Lieutenant Colonel James L. Varley, JA (on brief).

14 April 2015

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of damaging non-military property of a value more than $500, in violation of Article 109, Uniform Code of Military Justice, 10 U.S.C. § 909 [hereinafter UCMJ]. Contrary to his pleas, a panel consisting of officer and enlisted members convicted appellant of aggravated sexual assault[1] and wrongfully communicating a threat, in violation of Articles 120 and 134, UCMJ. Appellant was acquitted of the remaining offenses, to include an Article 127, UCMJ, extortion charge. The convening authority approved the adjudged sentence of a bad-conduct discharge, hard labor without confinement for sixty days, and reduction to the grade of E-3.

[1] Appellant was found not guilty of the charged offense of rape but convicted of the lesser-included offense of aggravated sexual assault.

This case is before us for review pursuant to Article 66, UCMJ. Appellant submitted a merits pleading and personally raised several issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), none of which merits discussion or relief. However, an additional matter merits discussion and relief.

FACTS

At trial, appellant faced charges based on his sexual assault of Ms. AF and an unrelated incident involving Private First Class (PFC) CL, his girlfriend at the time. It is this latter incident and the resultant charges that merit additional analysis. Specifically, in August 2012, while appellant napped, PFC CL found a photo of another woman stored on appellant's cell phone. Suspecting infidelity on appellant's part, PFC CL confronted appellant about the photo. This discussion soon escalated from talking to yelling and culminated with appellant allegedly pushing PFC CL[2] and then picking up her laptop computer and smashing it to the ground.[3]

Immediately after appellant damaged the laptop, PFC CL asked appellant to pay to have it repaired or replaced. Appellant refused. The next day, PFC CL again requested that appellant compensate her for breaking her computer. She warned appellant that if he continued refusing to pay for the computer, she would report the incident to the chain of command. Appellant responded by telling PFC CL that if she went to the chain of command, he would inform the chain of command that she was having a relationship with a married soldier. At trial, PFC CL admitted appellant's allegation that she was involved with a married soldier to be true. It was this threat that led to appellant being charged with both extorting PFC CL and wrongfully communicating a threat to PFC CL, pursuant to Articles 127 and 134, UCMJ, respectively. While appellant was acquitted of extortion, he was convicted of wrongfully communicating a threat.

LAW AND DISCUSSION

In accordance with Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F.

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[2] Appellant was charged with assault consummated by battery, in violation of Article 128, UCMJ, for unlawfully shoving PFC CL in the chest and arms with his hands. The military judge granted a defense motion made pursuant to Rule for Courts-Martial 917 to except the word "chest". The panel acquitted appellant of the remaining assault charge.

[3] This act of damaging PFC CL's laptop led to the Article 109, UCMJ, charge to which appellant pleaded guilty.

2002). "The test for legal sufficiency is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the [appellant's] guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

Having completed our review of the legal and factual sufficiency of appellant's conviction for wrongfully communicating a threat, we find it wanting. In this case, appellant's threat to truthfully reveal PFC CL's misconduct to the chain of command falls short of the requirement that appellant's communication be "wrongful." *Manual for Courts Martial, United States* (2012 ed.), pt. IV, ¶ 110.b.(3). Although appellant's threat to disclose true information coupled with the proscribed motive of gaining an advantage by inhibiting PFC CL from revealing his own misconduct may have supported an extortion conviction, the panel acquitted appellant of that charge. This outcome may well have been avoided had the government not offered the panel an alternative, albeit flawed, theory of an Article 134 offense for communication of a threat. Be that as it may, we are simply not convinced that appellant's threat to report a potential crime was wrongful pursuant to Article 134, UCMJ. *Contra United States v. White*, 62 M.J. 639 (N.M. Ct. Crim. App. 2006).

CONCLUSION

On consideration of the entire record, the findings of guilty of Charge V and its Specification are set aside and that charge and specification are DISMISSED. The remaining findings of guilty are AFFIRMED. We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). In evaluating the *Winckelmann* factors, we find no dramatic change in the penalty landscape that might cause us pause in reassessing appellant's sentence. Additionally, the nature of the remaining offenses still captures the gravamen of the original offenses and the circumstances surrounding appellant's conduct. Finally, based on our experience, we are familiar with the remaining offenses so that we may reliably determine what sentence would have been imposed at trial. We are confident that based on the entire record and appellant's course of

conduct, the panel would have imposed a sentence of at least that which was adjudged.

Reassessing the sentence based on the noted error and the remaining findings of guilty, we AFFIRM the approved sentence. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court